If therefore we take the matter as from the date of the codicil, Eng Choe was not bankrupt at any time during the remainder of the testator's life or afterwards. On a strictly grammatical construction of the words "shall become bankrupt" and without any reference to real or presumed intention, no cause of forfeiture has arisen.

It is assumed that the testator at the date of the codicil knew of his son's bankruptcy it must equally be assumed that he knew of the discharge. Similarly, if knowledge that similar clauses had been construed as applying to prior but uncompleted bankruptcies is attributed to the testator he must equally be taken to have known that such clauses are deemed to be based on an intention to prevent alienation. If he really intended to forfeit for stigma he had an opportunity to say so in his codicil; he did not do so.

For all these reasons it appears to me that Eng Choe's interests under the will are not forfeited.

To sum up — I am of opinion that the question was not *res judicata* but that the trustees and Eng Choe were estopped by the record from contending that his commission was forfeited; the other beneficiaries were not estopped; that the question of forfeiture of Eng Choe's other interests were technically open to all parties but that no forfeiture had been incurred.

The issue is, in the main, duplication of a question already litigated. It is especially important to discourage, by all available means, the frittering away of any estate, large or small, in costs. The estate has already borne the costs of all parties to Originating Summons No. 137 of 1940 and it is wholly deplorable that there should have been this duplication. But on the materials now before me it is impossible to say how far the present litigation may be due to an excess of legal ingenuity, how far to the lack of it (for instance, in relation to the order already discussed) and how far to changes of view of the trustees or their advisers which, if they have occurred, may be due to changes in personnel of either or both. At present, therefore, I do not see any sufficient reason for ordering payment of costs otherwise than out of the estate but if any party wishes to adduce evidence or argument on this point the Summons can be set down for further consideration.

In any event the formal order must be settled before a Judge in Chambers.

Order Accordingly.

Solicitors: *Drew & Napier; Sisson & Delay; Allen & Gledhill.*

HAJI DAUD & ANOR. v. MOHAMED YASIN.

[A. C. J. (Callow J.) December 7, 1948]

[Malacca — Civil Appeal No. 3 of 1948]

Practice — Jurisdiction — Res judicata — Matter adjudicated before Kathi — Whether Magistrate has jurisdiction — Mohammedans Ordinance (Cap. 57).

In this case the respondent obtained judgment in the Magistrate's Court for the sum of $300 alleged to be the amount of compensation (tebus talak) agreed to be paid by the first defendant. It appeared that the first defendant had agreed to pay the sum of $300 in the nature of compensation for the crime of adultery.

Held, (1) when the learned Magistrate became aware of the judgment or order of the Kathi, he should have held *res judicata* and dismissed the action; (2) the judgment of the learned Magistrate in this case was wrongly given and must be set aside.

CIVIL APPEAL.

C. S. Jayaswal for the appellants.

W. H. Salt for the respondent.

Callow J. : — This is an appeal by the defendants against the judgment of the Magistrate, Malacca, delivered on the 28th of August, 1948, in favour of the plaintiff-respondent for $300 and costs.

It is apparent that the matter was before the Kathi of Belimbing, Alor Gajah, on the 5th of March, 1948, and his decision reads :—

On this day, 5.3.48 I have decided the case between Mohamed Yasin bin Mohd. Som and Haji Daud bin Haji Ali regarding the wrongful act of Haji Daud on his (Mohd. Yasin's) wife.

I have examined this case, and having heard the evidence given by witnesses in this Court and on the admission of Haji Daud (not present but deputised by his brother Haji Yunus), Haji Daud asks that this matter should not be brought up before a higher Court and requested that he be allowed to pay $300 (Tebus Talak). Mohamed Yasin agreed to the offer made by Haji Daud, I, therefore, ordered as aforesaid.

The payment is guaranteed by Haji Yunus verbally and in writing before me.

Sd. Kathi Haji Mahadi bin Naam.
(Seal) 5.3.48.

Mr. Salt for the plaintiff-respondent said he took action in the Magistrate's Court because it was the only way he could proceed to execution. He said he regarded the decision of the Kathi as an arbitration award, and not as a Court judgment. Mr. Salt pointed out that the parties had acted in accordance with custom and had submitted to the Kathi's inquiry. The question of jurisdiction had not been raised prior to this appeal, and it was too late to do so.

But learned Counsel for the plaintiff-respondent himself raised jurisdiction in the Court below. Part of the note of his address reads :—

Ex. B. (that is the Kathi's decision). It has not been set aside — this Court has no power to examine whether or not Kathi has jurisdiction.

The note is taken from page 7 of the record.

Now the Kathi's jurisdiction is set out in the Mohammedan Ordinance (Cap. 57). Mr. Jayaswal

for the defendants-appellant submitted that the Kathi acted by virtue of the powers contained in that Ordinance, although the jurisdiction could not be founded on any particular section; I had some difficulty in appreciating this argument, and indeed it was in flat contradiction of ground B in the petition of appeal. Certainly at page 7 of the record the Kathi held that *Islamic law* applied, not custom, and by *Islamic law* he professed to give judgment.

There is no translated record of the proceedings in front of the Kathi, and Mr. Salt observed rightly that the merits or demerits of the dispute were not the subject of investigation in the Court below. There the claim was :—

> The plaintiff claim against the first defendant as principal and the second defendant as guarantor for the sum of $300 being the amount of compensation (tebus talak) agreed on 5.3.48 to be paid by the first defendant.
>
> **Particulars:** At an enquiry held before the Kathi of Sungei Bahru on the 5th March 1948, the first defendant undertook to pay the sum of $300 as compensation (tebus talak), and the second defendant guaranteed payment thereof.

On what is before me the first defendant-appellant is alleged to have committed adultery *(zina)* with the wife of the plaintiff-respondent. On inquiry, but by procedure and law foreign to Islam, the first defendant-appellant is said to have agreed to pay to the plaintiff-respondent the sum of $300 in the nature of compensation for the crime, for adultery is a crime in Mohammedan law. The second defendant-appellant stood surety for the payment of the sum.

But it seems to me that rightly or wrongly, probably wrongly, the Kathi purported to act in accordance with the powers he assumed he possessed by virtue of the Mohammedan Ordinance. If he purported to act under section 22, then that same section provides for both appeal and execution. There is also in the Mohammedan Ordinance revisionary powers in section 25. I confess I find it difficult to apprehend how the Kathi held his jurisdiction sufficient, but then, as I have intimated, I am not seized with all the detail of the dispute.

Now suppose the learned Magistrate had found opposite to the conclusion recorded? It would mean a judgment or order having an effect conflicting with that of the Kathi — the latter in Exhibit B appears to have entered a consent judgment in favour of the plaintiff-respondent for $300; if the Court below had found in favour of the defendants-appellants it would mean that the same judgment would be negatived.

There is, in my view, no doubt that Exhibit B is a judgment or order. Mr. Salt in his address described it as an order, and Mr. Jayaswal emphasised that not only did the Kathi make the order, but it was sealed. Examination of Exhibit B satisfies me conclusively that rightly or wrongly the Kathi professed to act in his judicial capacity. The only source of such capacity which I have been able to discover is derived from the Mohammedan Ordinance; I know of no authority, nor was any cited to me, whereby the Kathi may conduct, as Kathi, inquiries and make awards in accordance with the adat or local customary law. It may be that he has on other occasions done so; it may be that in this very instance he has in fact so acted; but he himself disclaimed this and maintained he tried and decided the case between the parties in accordance with Mohammedan Law. The only source of jurisdiction in this respect is the Mohammedan Ordinance (Cap. 57), and beyond saying that the proceedings of which Exhibit B is the judgment or order purport to have been conducted in exercise of the powers contained in Cap. 57, I do not think it is within my jurisdiction to inquire into or pronounce such proceedings wrong or invalid or *ultra vires*, however much they would so appear on the face of them.

If either party felt aggrieved he could have sought appeal to the Registrar appointed by virtue of section 3 of the Mohammedan Ordinance, or by petition for revision in accordance with section 25 of the same Ordinance.

I am bound to hold that the proceedings in the Court below were misconceived. I consider it would be a most dangerous precedent if the Court below could be invoked to enforce a judgment or order of dubious validity made by the Kathi, for that would be the effect if the appeal is dismissed. When the learned Magistrate became aware of the judgment or order of the Kathi, evidenced by him in testifying (page 6 of the record), then I consider he should have held *res judicata*, although it was not pleaded. In the Court below the plaintiff-respondent appeared, as in this appeal, by Mr. Salt; the defendants-appellants were not legally represented.

I therefore uphold this appeal, though not on the grounds set out in the petition. The judgment of the Court below is set aside, and instead of the finding recorded in favour of the plaintiff respondent I direct the entry of dismissal of the action on the grounds of *res judicata*.

In consequence of my finding the position is that judgment or order in Exhibit B — it may be construed as a consent judgment — at present stands, and continues to stand unless or until varied or set aside, in favour of the plaintiff-respondent against the two defendants-appellants.

I have considered carefully the question of costs, and decided that both in this Court and the Court below each side should bear its own costs.

Appeal allowed.